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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

10 CR 367(KBF)

5 JOHNNY NUNEZ GARCIA,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 April 29, 2015  
12:00 noon

10 Before:

11 HON. KATHERINE B. FORREST,

12 District Judge

14 APPEARANCES

15 PREET BHARARA  
United States Attorney for the  
Southern District of New York

16 MICHAEL FERRARA  
Assistant United States Attorney

17 GERALD DICHIARA, ESQ.  
18 Attorney for Defendant

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1                   THE COURT: Good afternoon, everyone. Please be  
2 seated.

3                   THE DEPUTY CLERK: Counsel, please state your names  
4 for the record.

5                   MR. FERRARA: Good afternoon, your Honor. For the  
6 government, Michael Ferrara. And with the Court's permission,  
7 I am joined by intern Jonnah Hollander.

8                   THE COURT: Good afternoon to both of you.

9                   MR. DiCHIARA: Gerald DiChiara for Johnny Garcia.

10                  THE COURT: Good morning, Mr. DiChiara. The Court  
11 notes that Mr. Nunez Garcia is here and present in the court  
12 this afternoon. Good afternoon, sir.

13                  Mr. Nunez Garcia, I see that you are being assisted by  
14 the interpreter who will translate from English into Spanish  
15 and you are wearing the equipment. From time to time the  
16 equipment malfunctions -- the battery runs out or something  
17 else happens -- so if you can't hear the translation, then make  
18 sure either Mr. DiChiara knows or raise your hand and we'll  
19 make sure it gets fixed right away; all right?

20                  What I wanted to do was first set the stage for this  
21 resentencing proceeding for Mr. Nunez Garcia by setting out in  
22 one place the procedural history of this case, what brings us  
23 here and my interpretation of the scope of the mandate so that  
24 we understand how far the Court can or cannot go in this  
25 proceeding. Then what I propose to do is set forth on the

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1 record all the materials that I have received and then we'll  
2 take it from there. I will obviously hear from counsel and  
3 from Mr. Nunez Garcia to the extent that he would like to  
4 address the Court before resentence is imposed.

5 Does that sound like a reasonable way to proceed from  
6 your perspective or would you like to do something else?

7 MR. FERRARA: That's fine with us, your Honor.

8 THE COURT: Mr. DiChiara?

9 MR. DICHIARA: That's fine, Judge.

10 THE COURT: So it is going to take me a couple minutes  
11 because as you folks know I was not the original sentencing  
12 judge on this matter, Judge Griesa was. So I have spent a  
13 significant amount of time learning about this case and about  
14 Mr. Nunez Garcia in particular.

15 As you folks are certainly aware, Mr. Nunez Garcia was  
16 originally arrested on gun charges in the state in  
17 January 2010. He was arrested in fact according to Probation,  
18 which I confirmed on January 5th, 2010. He was held in state  
19 custody until he was written into federal custody in May 2010.  
20 That of course does not mean that that duration of time is  
21 reflected in his federal sentence. He was still "on loan" from  
22 the state at that time. Mr. Nunez Garcia was then convicted in  
23 the state of the gun charges in July 2010 and sentenced to  
24 principally a five-year term. That sentence runs from the time  
25 that the defendant is in state custody, stopped when he

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1 formerly came into federal custody, which I understand was  
2 actually after his sentencing originally by Judge Griesa and so  
3 that would be March 2013 and that is based upon information  
4 from Probation. So he has some remaining amount of that  
5 sentence undischarged at this time.

6 At the sentencing of the crime of conviction before  
7 this court, which I will get to in a moment, Judge Griesa did  
8 state that the federal sentence should run concurrently with  
9 the state conviction. One question for this Court today is the  
10 5G1.3 issue that was raised on appeal and that is reflected in  
11 the submissions by the parties, which is the extent to which  
12 Mr. Nunez Garcia should get credit stated in the judgment from  
13 this Court for the period of time during which he was in state  
14 custody, which effectively is January 5th, 2010 until either  
15 January 2013 or March of 2013 depending if you judge it from  
16 the formal writ back to federal custody and therefore no longer  
17 on loan, which is March 2013 or the original date of  
18 sentencing, which is January 10th, 2013. We'll talk about that  
19 more in a moment.

20 At the trial itself Mr. Nunez Garcia was convicted on  
21 two counts -- Count One, which he was convicted on a conspiracy  
22 to distribute and possess with intent to distribute crack and  
23 there was a special verdict where the jury found specifically  
24 that it was 280 or more grams of crack and then also a firearm  
25 charge. That sentencing was on January 10th as I said. The

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judgment issued on January 11th, 2013. At the sentencing Judge Griesa broke the sentence into two pieces. He imposed a 240-month term, with 120 months for Count One and 120 months for Count Two. In connection with Count Two, Judge Griesa made a judicial finding that the firearm at issue in Count Two had been discharged and rather than using that as a 3533(a) factor used it instead to impose the mandatory minimum sentence for a discharged firearm which was 10 years. Under Supreme Court precedent, that is the *Alleyne* case, that was error which the government conceded and the Second Circuit then remanded this for resentencing and it was certainly raised by the defendant in connection with this appeal. However, at his sentencing as well, it is important to the Court and I note that Judge Griesa did spend time discussing the defendant's particular background, what were deemed by Judge Griesa to be mitigating circumstances in terms of his childhood and family situation and Judge Griesa also spent some time discussing his particular view as to the duration of the sentence, which was 20 years, 240 months, as a sentence which he believed was in my words sufficient but not greater than necessary because he said it was effectively long enough.

So on appeal there were a number of issues raised. There were both issues as to the conviction itself as well as issues as to the sentencing. As to the conviction there were issues raised as to evidentiary rulings as well as sufficiency

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of the evidence. The Second Circuit in its summary order, which brings us here today which was issued in October of 2014 did affirm the conviction. It did so implicitly by stating all other arguments were deemed without merit and it specifically then remanded the matter, this sentencing, for purposes of imposing a five-year mandatory minimum for Count Two. In other words, eliminating the firearm being discharged as not being consistent with something the jury was specifically asked to find as well as to deal with the 5G1.3 issues.

Now, I say this and I am going to talk about a little bit more because now we're about to go into the scope the mandate. The scope of the mandate became a little bit more complicated by the manner in which the government briefed these two issues on appeal. We're not putting aside all the issues relating to the conviction itself but dealing now with the sentencing. The reason it becomes somewhat more complicated is that typically when there is an error in sentencing and there is a remand simply to resentence to fix a particular error and there is an instruction on that error, the resentencing is a narrow one. It is quite limited and it is limited to fixing the error. Here, however, the government briefed the 5G1.3 and the Alleyne firearm issue effectively together in back to back sections in their appeal brief saying, We consent to the resentencing on the firearm and by the way you need not reach the ineffective assistance of counsel because there is going to

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1 be a resentencing opportunity. That implies, though is not  
2 explicit, that the resentencing opportunity would be a de novo  
3 resentencing opportunity as opposed to the narrowly limited  
4 resentencing opportunity. So it opens the question as to the  
5 scope of the mandate.

6 Now, the Second Circuit in its mandate because as you  
7 folks know and case law suggests it is hard to go back to the  
8 mandate itself and read the mandate and not go beyond the  
9 actual language of the mandate or importantly here the spirit  
10 of the mandate. The mandate here, the Second Circuit noted in  
11 its very short summary order the Alleyne issue and then stated  
12 right after that, Accordingly -- I think the word accordingly  
13 is important because it is directly connected to the Alleyne  
14 issue -- we instruct the Court to vacate and resentence with a  
15 mandatory minimum on Count Two of five years in keeping with  
16 the jury's factual findings that Garcia used and carried a  
17 firearm in furtherance of the conspiracy. The Court then  
18 stated, We decline to address Garcia's argument that he was  
19 deprived of ineffective assistance of counsel at sentencing.  
20 The opportunity for resentencing renders that argument moot.

21 So that again doesn't quite answer the question as to  
22 whether this is under the Pepper case, which is the Supreme  
23 Court case from 2011, this is a "clean slate proceedings" or  
24 whether the mandate is a narrow one. In the Pepper case, the  
25 Supreme Court noted that a criminal sentence is a package of

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1 sanctions that the District Court utilizes to effectuate its  
2 sentencing intent and that altering one portion of that package  
3 may undermine the intent. Also, the Supreme Court has said  
4 that when you vacate the sentence that has generally particular  
5 implications in terms of eliminating the prior ruling  
6 altogether. However, the Second Circuit has said that in  
7 general resentencing should be narrowly construed and that is  
8 where the Second Circuit has gone into the narrow view of the  
9 spirit of the mandate.

10 So with that said I want to go into a couple  
11 propositions and I am almost done with this, but I did want to  
12 lay it out in case there is any question later as to the law  
13 and principles I am relying on. You folks I am sure are aware  
14 of and would agree with the various principles relating to the  
15 law of the case and the importance of the law of the case not  
16 to allow or have re-litigation of issues litigated and finally  
17 resolved as well as due process that can come into play with  
18 that. I am sure you folks are also aware of the general  
19 principles that resentencing occurs under the various factors  
20 of 3553(a) and are also aware the principles relating to the  
21 Second Circuit's case law on when a resentencing court even  
22 consistent with a narrow mandate may resentence in a manner  
23 that is lower than the original sentence imposed or higher than  
24 the original sentence imposed depending upon how the defendant  
25 is or appears to the Court as of the date of resentencing.

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1 That is in the *Coke* decision in 1968 where a defendant's  
2 conduct since originally sentencing may be taken into account;  
3 it is the *Quiatirei* case of 2002, which stands for a very  
4 similar proposition; the *Core* case in the Second Circuit 1997,  
5 and the *Werber* case (2d Cir. 1998). These cases also indicate  
6 that resentencing after elimination of convictions for  
7 particular counts is a different kettle of fish if you will  
8 than a resentencing after simply a remand with a particular  
9 instruction than elimination of account is generally more de  
10 novo. Resentencing after an error is generally quite narrow.  
11 That is consistent with the mandate rule under the *Bryce* case,  
12 which is a Second Circuit 2002 case.

13 Therefore, based upon all of these principles and the  
14 finality, which is clear from the parties' discussion in terms  
15 of the appeal, and what was not raised on appeal or what was  
16 raised on appeal, I see the task before this Court as a  
17 relatively narrow one, but one which is consistent with the  
18 Court's ability to take into account the additional facts and  
19 circumstances which have come to light since original  
20 sentencing. The principle finality suggests that the other  
21 issues that were not raised originally as to the sentencing, in  
22 other words, whether the particular findings as to the  
23 enhancements were appropriately done for the offense  
24 calculation for the guidelines, those are gone. Those are done  
25 and final at this point in time.

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1                 The three issues before the Court currently relate to  
2 the following: One, the imposition of a mandatory five-year  
3 minimum for the firearm count. However, that implicitly then  
4 comes with an instruction to the Court implicitly to engage in  
5 a 3553(a) analysis of the manner in which the firearm charge  
6 ought to be dealt with in terms of 3553(a) and whether or not  
7 the 10-year mandatory minimum, which the Court had previously  
8 imposed in error also happened to correspond with the Court's  
9 assessment or would correspond with the Court's assessment of  
10 3553(a) factors. The second issue is the 5G1.3 issue and the  
11 third issue is dealing with whatever new evidence is before the  
12 Court in the manner that the Court deems appropriate under  
13 3553(a).

14                 So with that said I would state that nothing in the  
15 transcript indicates that Judge Griesa would have imposed more  
16 than 10 years for Count Two even if undertaking a 3553  
17 analysis. So this Court needs to be mindful of Second Circuit  
18 precedent that while the philosophy of the second sentencing  
19 court may be different from the first that is not to inure to  
20 the detriment of the successfully appealing defendant and  
21 therefore the Court would not impose more than 10 years under  
22 any 3553 analysis for the firearm count. That is of course  
23 separate from the manner in which the Court reviews the conduct  
24 since the last sentencing.

25                 I think that gives you a sense of the way that I

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1 interpreted the mandate. I am now going to state the materials  
2 I have received, which will go very quickly and turn it over to  
3 you folks. Before I do that, do either of you want to address  
4 the scope of the mandate?

5 MR. FERRARA: Yes, I would, your Honor. I apologize  
6 if our brief was not clear. If Mr. Garcia had not engaged in  
7 the bad behavior outlined in our brief since last sentencing,  
8 we would not be asking for an increase in sentencing. I would  
9 still be arguing for 20 years based on the fact that I think in  
10 light 3553(a) and the mandate, the Court is still entitled to  
11 impose 20 years. That is to say the 10 years on Count Two. I  
12 would still be arguing for that. The only reason the  
13 government is arguing for more time here is because of the  
14 conduct since the original sentencing. I think that is  
15 absolutely clear law. Even the cases the defense cites  
16 *Quiatirei*, which your Honor just cited make it clear that  
17 issues since sentencing may be considered by a resentencing.

18 THE COURT: I understand that. That is the *Coke*  
19 indicate, the *Core* case, *Quiatirei* case. There is a whole  
20 variety of cases which go to that proposition, which is you  
21 sentence a defendant as he stands before you at the time of  
22 resentencing.

23 The confusion that I ran into frankly, Mr. Ferrara,  
24 and I didn't think you were necessarily hanging your hat on de  
25 novo resentencing, I didn't get that from your submission, but

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1 because you had raised the issue with respect to Mr. Lopez and  
2 his 20-year sentence and he had pled, it was suggestive of a  
3 rejiggering, if you will, that could be construed as  
4 potentially different from just the disciplinary issues which  
5 have occurred since. His case, I will just say it right now in  
6 terms of how I see Lopez as different because he of course  
7 pled, but he also pled to a plea agreement where he pled that  
8 he had discharged a firearm. So he had a mandatory 20 years.  
9 He had a mandatory 10 on the drug count and a mandatory 10 on  
10 the firearm count. So his situation itself is *sui generis* as  
11 is the defendant Mr. Nunez Garcia. So that is the reason for  
12 my laying it all out and just in case anybody was confused.

13 It sounds like you are not disagreeing with my view of  
14 the mandate?

15 MR. FERRARA: Absolutely not, your Honor. We cited to  
16 Lopez because while your Honor is right that there are  
17 differences of course, I also thought that it was worth  
18 mentioning because I do think that it is fair to say that just  
19 in terms of the 3553(a) factors as to Count Two, there is some  
20 injustice to the idea that Mr. Lopez would receive more than  
21 Mr. Garcia would putting aside -- that is the argument about  
22 why 20 is appropriate. That is why I put Mr. Lopez in there.  
23 That is the only reason. I was not in any way suggesting  
24 because Mr. Lopez got 20, Mr. Garcia ought to get more than 20.

25 THE COURT: I understand.

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1                   Mr. DiChiara, would you like to address the mandate?

2                   MR. DiCHIARA: Quickly I would point out I think the  
3 Court is thinking along these lines, but I would point out in  
4 the *Malki* case which I cited that Court referenced *United*  
5 *States v. Raftis*, which says that the law construes ambiguous  
6 language in a sentence pronounced favorably to imprisonment.  
7 So any ambiguous language should be decided in favor of  
8 Mr. Nunez Garcia.

9                   THE COURT: I agree with that and noted that in your  
10 submission and that is the reason why even though the Court  
11 finds some ambiguity in the manner in which the mandate came  
12 down, I think it is correct to keep it narrow, which means  
13 we're not resentencing today for in terms of all issues are not  
14 open. Count One is as it was. The findings as to the offense  
15 calculation but for the revised guidelines from 2014 which  
16 bring it down by two levels for everyone remain the same. The  
17 issue is really Count Two, the imposition of a different  
18 mandatory minimum and the consideration of 3553(a) factors  
19 solely with respect to Count Two and then the 5G1.3.

20                   MR. DiCHIARA: Fine, Judge. Do you want me to address  
21 the issue of the prison infractions now?

22                   THE COURT: Let me just recite the materials and then  
23 I will turn it over to you folks. It will go very quickly now  
24 that I have gotten that first issue out of the way. I have  
25 looked at a number of materials in connection with the

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1 sentencing proceeding -- the prior trial transcripts to inform  
2 myself as to the 3533 factors; the prior sentencing transcripts  
3 for Mr. Nunez Garcia of January 10, 2013; the judgment of  
4 January 11th, 2013; the briefs on appeal both from Ms. Messina  
5 and her replacement counsel due to the ineffective assistance  
6 claim; the mandate; the PSR of April 23rd, 2012, which has not  
7 been updated; the materials relating to Mr. Javier Lopez, in  
8 particular as I mentioned the plea agreement this Court, I,  
9 also did his sentencing and I reviewed my prior sentencing  
10 transcript.

11 I have also looked for this defendant at the forensic  
12 psyche evaluation from Dr. Drob dated October 30th, 2011. I  
13 requested that from Ms. Messina. It was reflected in her prior  
14 defense submission and I thought it might be useful. I put  
15 that under seal in this matter and it will be available.  
16 Counsel should have had that sent to them yesterday from my  
17 deputy. I have also looked at Messina's sentencing submission  
18 dated December 5th, 2012. Then Mr. DiChiara's three  
19 submissions date April 1, 2015, with attachments A through D;  
20 his April 23rd 2015 with attachments A through H; his  
21 April 27th submission date attaching two letters, one from the  
22 defendant's mother and one from his sister. The government had  
23 a submission which I reviewed dated April 9th, 2015, which has  
24 attached to it 51 pages of disciplinary records.

25 Mr. DiChiara, given the scope of this proceeding are

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1 there any objections to which you now want to raise in  
2 connection with the PSR of April 2012?

3 MR. DiCHIARA: No, Judge.

4 THE COURT: Let me just say the offense level is  
5 adjusted slightly because of the two-level reduction and the  
6 changes as of November 2014. So the offense level is now 42  
7 and criminal history category of three, which corresponds to  
8 360 to life. However, the Court is not going to resentence as  
9 to Count One. I just note that for the record.

10 Let's turn it over now to Mr. Ferrara, Mr. DiChiara  
11 and then Mr. Nunez Garcia. The way I do it, I have the  
12 government go first and the defense counsel and then the  
13 defendant as opposed to defense counsel first.

14 MR. FERRARA: Understood, your Honor.

15 Your Honor, first I want to try compartmentalize my  
16 remarks to make it clear what I am and am not arguing for as we  
17 just discussed. First, let me just address why a sentence of  
18 10 years on Count Two is still the appropriate sentence despite  
19 the change. That is to say putting aside Mr. Garcia's  
20 post-sentencing conduct why even if I were sort of arguing  
21 Judge Griesa years ago had he not found a discharge why 10  
22 years would be appropriate sentence on Count Two and then I  
23 would like to address the prison conduct and why that takes us  
24 over 10 years as to Count Two.

25 So your Honor has said the Court has reviewed the

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1 trial transcript. I was the AUSA who tried this case. The  
2 evidence of the use of guns was really sensational. There were  
3 two different shootings in this case, two different actual  
4 shootings that resulted in harm to human beings. There was a  
5 lot of testimony about being discharged, but in particular two  
6 that really reflect the utter disregard that this defendant has  
7 for people and for human life. One was the shooting of Natalie  
8 Santana where the defendant was outside of the building where  
9 he sold crack and there was an argument involving some women  
10 and in order to scare them off he fired a weapon at the ground  
11 and the bullet ricocheted and struck one of the women. She  
12 thank God was not seriously harmed. An ambulance had to come.  
13 That is one. This idea that there is a problem with these  
14 women so I am going shoot this gun because, as cooperator put  
15 it, they were heating up the spot. He didn't want to call  
16 police attention to that location. His way of putting it was  
17 these women are heating up the spot so get me my gun because  
18 they are heating up the spot. That is to say potentially  
19 attracting police attention.

20 The second one, your Honor, was really sort of a  
21 terrible piece of testimony from a third cooperator. Eddie  
22 Valez described a night when he looked out of his apartment  
23 window and saw the defendant and another person outside the  
24 window. Eddie Valez had just heard some gunshots and looks out  
25 his window and sees the defendant and another person jumping

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1 over the fence. Though Mr. Valez did not see who actually shot  
2 through the window next door to his, he did see Mr. Garcia with  
3 something. He wasn't sure what. The jury was entitled to  
4 infer and this Court is entitled to infer that that was a gun  
5 and that Mr. Garcia was involved either himself or with the  
6 person next to him in shooting a person who lived next door to  
7 Mr. Valez. The reason that Mr. Garcia would have wanted to  
8 shoot that person was that as Mr. Valez testified those  
9 apartments were associated with a gang called the Wheeler Boys.  
10 Mr. Garcia was in the gang called Dominicans Don't Play and/or  
11 involved with a group of guys who sold crack on Elder Avenue,  
12 which is a block away from Wheeler in the Bronx.

13 So Mr. Garcia possibly thought that he was or his  
14 associate who was with him was shooting a member of the Wheeler  
15 Boys in that apartment. There was testimony both from  
16 Mr. Valez and another cooperator about seeing that person. The  
17 man managed to drag himself out of the first floor apartment.  
18 There is the usual testimony about blood being everywhere from  
19 gunshot wounds. Again, it is sort of a miracle that this man  
20 lived and in fact had nothing to do with the Wheeler Boys. A  
21 completely innocent bystander of this. A man who lived in his  
22 apartment in which these other crack dealers also happened to  
23 live in but had no association with these men. Both Mr. Valez  
24 said he had no association, a member the Wheeler Boys who  
25 testified at the trial, Mr. Torres, also said that man had no

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1 association whatsoever with the Wheeler Boys. So again just an  
2 innocent person whom Mr. Garcia either shot or helped another  
3 person to shoot and again just who happened to live. Otherwise  
4 this would have been a murder trial. So based on that  
5 testimony, Judge Griesa is entitled as a matter of 3553(a) to  
6 find that Mr. Garcia had discharged a weapon in connection with  
7 his drug dealing with an utter disregard for human life and in  
8 an attempt to kill a person who he believed was a rival crack  
9 dealer.

10 For those reasons, your Honor, as well as all the  
11 other testimony, and I will not recount it, your Honor one of  
12 the things that we had at trial, and I apologize I don't have  
13 it now, but there were guns found in an apartment that  
14 Mr. Garcia controlled. He had the keys on him to that  
15 apartment. That conduct predicates his state conviction. We  
16 also brought the officers in to testify here. There were a  
17 couple handguns. The papers really cannot describe. There was  
18 a couple handguns, a shotgun and then there was a machine gun,  
19 your Honor. It was to the point where our NYPD officer who is  
20 a first grade detective of the NYPD who has been an officer for  
21 over 20 years had never seen anything like it. It is a Belgium  
22 machine gun. It has sort of a circular type of loading  
23 cartridge. It is an unusual weapon. It is not even like a  
24 small Uzi. This was a large machine gun that we brought into  
25 court that was found in an apartment that Mr. Garcia controlled

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1 to which he had the keys and cooperators said that is where  
2 they stored crack and guns. We also found crack in the  
3 apartment.

4 So based on all of that Judge Griesa would have been  
5 entitled and I would have asked Judge Griesa to impose 10 years  
6 regardless of what the mandatory minimum would have been. That  
7 is the sort of the first part of my argument why no less than  
8 10 should be imposed on Count Two. I would end there if it  
9 were not for Mr. Garcia's conduct since his original  
10 sentencing. Again, I have submitted the disciplinary records.  
11 I don't need to go through it. Mr. Garcia has shown no sort of  
12 remorse, no rehabilitation since he has been in jail. He has  
13 engaged in assaults, bizarre sexual behavior involving guards,  
14 throwing liquid on guards, assaulting inmates and guards. Your  
15 Honor is entitled in light of that post-sentencing conduct to  
16 sentence the defendant to more than 10 years on Count Two.  
17 Again only because of that post-sentencing conduct.

18 THE COURT: So in the government's view to what extent  
19 should the Court take into consideration the fact that  
20 relatively severe penalties have already been imposed on the  
21 defendant for each of those disciplinary infractions, including  
22 lack of visitation, time in the SHU, loss of commissary  
23 privilege, good-time credits, etc.

24 MR. FERRARA: I am not suggesting that your Honor  
25 should not take that into account. It is absolutely

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1 appropriate for the Court to do that. I will say only that  
2 those are administrative penalties. It is appropriate here to  
3 say to the defendant -- I would say that the administrative  
4 penalties of the Bureau of Prisons is able to impose have not  
5 dissuaded the defendant from continuing his conduct. He is not  
6 getting the message. It is appropriate for this Court and the  
7 Court ought to send a stronger message to this defendant that  
8 this behavior is unacceptable, that he cannot simply sort of  
9 get away with it. That is to say, behave in this way, maybe  
10 lose some commissary, some time in the SHU, but that he can  
11 come back in front of a court of law like this and it will not  
12 be part of the ledger that a court considers. I think that is  
13 the wrong message. Since the defendant clearly is not getting  
14 the message from the Bureau of Prisons I think it is entirely  
15 appropriate for this Court to send a stronger message by  
16 increasing his sentence, his term of imprisonment here today.

17 Finally, your Honor, as to 5G1.3 issue we concede that  
18 given the change in the guidelines that the defendant is now  
19 eligible for that. However, I would ask the Court to be  
20 careful here. I am happy to help in any way I can. This is  
21 very tricky stuff the way of Bureau of Prisons calculates time,  
22 what credit a defendant gets preconviction. When he also has a  
23 state sentence. Here I have spoken to the Bureau of Prisons as  
24 well. I gave my best to find some of the folks who have been  
25 calculating Mr. Garcia's sentence. What I understand but I am

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1 not positive about these numbers, and I am happy to give more  
2 clarity for the Court, Mr. DiChiara and I can call your Honor's  
3 chambers, my understanding is that the Bureau of Prisons has  
4 given Mr. Garcia some credit for time served before  
5 January 2013. I believe it is about a year that he received  
6 credit by the Bureau of Prisons for time he served even though  
7 he was here on a writ. My understanding is the day he was  
8 sentenced in the state, which I want to say was maybe January  
9 of 2012, and I can find these numbers for your Honor, I  
10 apologize I don't have them at my fingertips. The day he was  
11 sentenced in the state is the day that the Bureau of Prisons  
12 stopped giving him credit. That period of time, from the day  
13 of his state sentencing until I understand it to be January of  
14 2013 when Judge Griesa imposed sentence but I will look into  
15 whether it was March, that that period of time is what  
16 Mr. Garcia ought to get credit for.

17 THE COURT: It is your view that everybody agrees he  
18 should get credit for the portion of time that he was arrested,  
19 which we all agree, and I will hear Mr. DiChiara, is  
20 January 2010, which I believe is January 5th, 2010, where he  
21 was in state custody serving state time and not given federal  
22 credit. Whatever that time period is.

23 MR. FERRARA: I am only suggesting that I believe some  
24 of the credit was given. Sorry that I didn't put a fine enough  
25 point on this. The reason I mention this is what I am

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1 concerned about is if your Honor styled a judgment that the  
2 defendant should receive credit for January 5th, 2010 through  
3 March 2013, I just worry that might be over inclusive in the  
4 sense BOPs may have already given him some credit for that. Or  
5 if your Honor was thinking about lowering the sentence based on  
6 those numbers, it might be that the Court ended up giving  
7 Mr. Garcia more credit than the Court wanted to. So one way to  
8 do this is not to compute the time but is to say in the  
9 judgment, which is what I understand from the Bureau of Prisons  
10 folks with whom I spoke, again we can double-check this or I  
11 can make sure Mr. DiChiara is comfortable, is that if your  
12 Honor styles the judgment as whatever amount of time your Honor  
13 wants to impose and then says with a reduction pursuant to U.S.  
14 Sentencing Guidelines 5G1.3 of the amount time served on the  
15 state conviction. My understanding is that Bureau of Prisons  
16 will get that message and will give him then the full credit.  
17 Again, I am happy to do this in any way that is comforting to  
18 the Court so we have the right answer. I want to make sure  
19 that we don't go over inclusive or under.

20 THE COURT: I don't disagree with you that will be the  
21 way I would normally do it. Frankly, what I wonder about is  
22 whether or not I need to come up with the time period myself  
23 because it says under 5G1.13(b)(1), The Court shall adjust the  
24 sentence for any period of imprisonment already served. And so  
25 it is your view that the adjustment could be in the form of a

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1 generalized statement as opposed to a number because the other  
2 way of doing it is to say that it is January to January, the  
3 three years and to say if the BOP has already calculated in  
4 giving him credit for any portion of that that should be taken  
5 into consideration.

6 MR. FERRARA: That I think would work. I only worry  
7 because I know the Bureau of Prisons was entirely clear with me  
8 that some portion of that has been credited.

9 THE COURT: If they've already taken some portion of  
10 those three years, but it is three full years in total, into  
11 account then he shouldn't get it twice but he should certainly  
12 get the other two full years.

13 MR. FERRARA: Totally agree.

14 THE COURT: So we'll figure out how to word it and I  
15 understand your point.

16 MR. FERRARA: Thank you, your Honor.

17 THE COURT: Mr. DiChiara.

18 MR. DICHIARA: Judge, the government says that they  
19 only would ask for an increase based upon the infractions yet  
20 they always bring up something that I am really not comfortable  
21 with addressing since I wasn't trial counsel, which is the fact  
22 that the underlying case to get the Court to sentence the  
23 defendant more harshly on Count Two. It always seems to me  
24 when you give a 924(c) and I think that is because it is  
25 contained in the guidelines somewhere and frankly I didn't know

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1 we were going to be focusing on this issue, but that he get  
2 five years if it 924(c), if it is the other one you get seven,  
3 and if it is the more hash you get 10 and that is in the  
4 guideline and the government always asks for a guidelines  
5 sentence on anything and yet here they are asking beyond that  
6 and I haven't ever seen that. I have never come across that  
7 situation.

8 THE COURT: As principle, and I understand in the  
9 terms of the government's position but in terms of the Court's  
10 discretion would you agree with me that the Court both -- well,  
11 it is really only relevant in terms of a resentencing court has  
12 the discretion both it is required that I impose the five years  
13 but then the discretion to take into consideration 3553(a) for  
14 Count Two, which may or may not lead me above five years as I  
15 can always do even in connection with sentencing anybody on a  
16 and 924 count. The guidelines are the guidelines and advisory  
17 only.

18 MR. DiCHIARA: I understand that, your Honor, but when  
19 we're dealing with the spirit of the mandate here, it seems  
20 something is fundamentally wrong when a person gets a 10-year  
21 count, goes up on appeal, gets reversed and the Court tells  
22 them that you have to impose a five instead of 10 and then we  
23 say, Well, we can forget what the Court of Appeals said and we  
24 can still do 10 because it is in your discretion to do then. I  
25 think there is something fundamentally wrong with that kind of

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1 argument. I also think that everything that the government has  
2 said was considered by Judge Griesa and I point that out in my  
3 brief. The sentencing disparity argument, the trial, the use  
4 of the guns, everything. Judge Griesa chose to give this  
5 defendant the lowest possible sentence that was available to  
6 him and to underline that he tried to give him the most lenient  
7 sentence that he could under the statutory limits. We see that  
8 when Ms. Messina asks him to run it concurrent with his state  
9 time, he does. I believe that if Ms. Messina had asked him to  
10 give him credit for under the 5G argument that we're dealing  
11 with now, he would have done that also.

12 So I believe that there is a mandate here that should  
13 be followed. I believe Judge Griesa, who was the trial judge  
14 who sat with this defendant four years and who was very much  
15 affected by his horrendous upbringing and his horrendous life  
16 that he lived for a very young man, had hope for this man.  
17 Now, I understand the government says he gets in trouble and  
18 everything, but none of the infractions have not been punished  
19 already as the Court has noticed, including the loss of 18  
20 months of visitation for a person in prison. He had no phone  
21 contact, not contact with the outside world and he has no  
22 visits for 18 months. The punishments he seems to be enduring  
23 are quite horrendous for a person who has a 75 IQ, who also has  
24 psychological problems.

25 And I read the report that your Honor was able to

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1 obtain in full and it is quite clear this is a very troubled  
2 person but that there might be hope. The report says that  
3 there might be hope. I have noted that when I looked at the  
4 infractions in Allenwood there are two infractions. They are  
5 basically for not being where he was supposed to be when he was  
6 supposed to be there and those two infractions are the only two  
7 infractions he has.

8 On the other hand he is enrolled in classes. He is  
9 going for his GED. He works. I outlined the whole week for  
10 your Honor. I think that in keeping with Judge Griesa who was  
11 the judge over this man for four years, I think that 10 years  
12 on Count One, five years on Count Two with credit for the jail  
13 time that he served in New York State is appropriate.

14 Thank you, your Honor.

15 THE COURT: Thank you, Mr. DiChiara.

16 Mr. Nunez Garcia, would you like to address the Court  
17 before sentence is imposed?

18 MR. DICHIARA: He said he is nervous, Judge, and would  
19 rather not.

20 THE COURT: I understand there is no requirement that  
21 you say anything, Mr. Nunez Garcia. It is just you can if you  
22 want to. The Court always invites a defendant to speak and to  
23 bring anything that he wants to the Court's attention. You  
24 don't have to.

25 Let me describe for you folks how I arrive at the

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1 appropriate sentence in this matter. As you all know I am  
2 guided by the 3553(a) factors primarily in connection with this  
3 resentencing proceeding. The guidelines are not as much a part  
4 of it, though. They are part of it to the extent that the  
5 range informs the Court generally speaking as to how some of  
6 the factors for the combined crimes of conviction would be  
7 treated in terms of ranges of potential imprisonment and to  
8 that extent they are informative, but as with all guidelines  
9 they are advisory only and not binding on the Court. So I look  
10 instead to 3553(a) and ask myself in terms of particularly here  
11 and solely here with respect to Count Two as well as the  
12 disciplinary proceedings and conduct underlying those  
13 proceedings what the history and characteristics are of this  
14 defendant and disciplinary proceedings are relevant to that.  
15 Then in terms of the nature and circumstances of the offense of  
16 Count Two, that is really the nature and circumstances that is  
17 reflected in the trial transcript.

18 In going through the trial transcript, I think we can  
19 all agree that the conduct underlying Count Two is as serious  
20 really as it gets without murder. Count Two conduct relates to  
21 the gun charge and there are multiple businesses. Indeed, it  
22 is like a war zone out there when you review the transcript.  
23 And as Mr. Ferrara noted there are multiple instances of  
24 firearms being used in support of the drug trafficking business  
25 that Mr. Garcia was a very important participant in and leader

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1       in. The shooting of the individual at 1160 Wheeler when he was  
2       shot three times including in the abdomen in July of 2009 is  
3       one instance that was obviously lots of testimony about that  
4       from difference angles during the trial. There is also  
5       shootings in the summer of 2009, a shooting at Chris Torres and  
6       there is the running up Wheeler Street shooting guns that is  
7       also included in the transcript. There is the actual shooting  
8       of Natalie Santana, which Mr. Ferrara raised in December of  
9       2009, where she was shot in front of 1151 Elder Avenue which is  
10      not actually a way to try to prevent there from being police  
11      attention to a particular area. There is eyewitness testimony  
12      as to that in that Mr. Nunez Garcia was also the possessor of a  
13      key to a location that stored a number of very serious  
14      firearms.

15           So the seriousness of the offense underlying Count Two  
16      is not really something which I think people could reasonably  
17      debate. The question is what is the proper punishment for  
18      that. I do believe that the 3553(a) factors are appropriately  
19      considered here. I am very mindful in paying great attention  
20      to the mandate and the spirit of the mandate only to look at  
21      Count Two, but I don't find anything in the transcript having  
22      read it very carefully of Judge Griesa's sentencing that  
23      indicates in absence of a 10-year mandatory minimum that  
24      3553(a) factors would have led him to a different sentence.  
25      For instance, there would be many ways as I so indicated but

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1 one way would have been to have suggested I am bound by this  
2 and I would give you less if I could and I don't find that in  
3 terms of the gun charges. I do find, however, that he spent a  
4 fair amount of time on mitigation in terms of why he would not  
5 go over 20 years generally speaking and I find that to be very  
6 important because when one considers 3553(a), it indicates an  
7 outer bound to where Judge Griesa at that time believed this  
8 matter should go.

9           This brings me to the history and characteristics of  
10 the defendant, which comes in two pieces. One, the history and  
11 characteristics that should be taken into consideration with  
12 regard to Count Two in terms of sentencing on that count ab  
13 initio for that count. So the history and characteristics  
14 evidence in the crime of conviction itself and during the trial  
15 but then also very importantly the history and characteristics  
16 since that time. Together I look at that in terms of  
17 indicating whether or not there is a disregard for life or a  
18 disregard for the safety of others or a tendency for use of  
19 force or the potential for use of force or the likely use of  
20 force. Here I note that several of these infractions frankly  
21 don't indicate much apart from a young man who desperately and  
22 understandably does not want to be in prison and a very young  
23 man at that.

24           So several of the infractions, while behavior that is  
25 not to be commended, is not something that the Court would

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1 impose a particularly lengthy sentence for because the Court  
2 does not believe that the disciplinary measures are  
3 insufficient as to those. I am talking about the sexual  
4 conduct as a for instance. It is not commendable but I believe  
5 it has been adequately dealt with. There is no indication that  
6 he was actually physically able to leave the cell and aggress  
7 upon anybody. He was just displaying himself to the  
8 corrections officers. But the conduct which does concern the  
9 Court is the kicking of the guard, the throwing of the liquid  
10 at guard, although that less so but still a type of assault,  
11 the finding of the assault that was known presentencing but not  
12 confirmed and verified until post sentencing as well as the  
13 altercation with the other inmate and then of course there is a  
14 threat to a corrections officer that the defendant in words or  
15 substance would be "getting" the correction officer at some  
16 point in time. Those together concern me because of the  
17 possible use or resort to force in terms of the defendant's  
18 characteristics and his display of consistent antisocial  
19 behavior. I am aware and I have taken into consideration  
20 exactly what Mr. DiChiara had mentioned, which is the 180 days  
21 of no visitation and no phone which is actually extraordinarily  
22 severe, and that was in connection with the corrections  
23 officers incident, the incident with respect to the physical  
24 assault that was in many ways more severe as the inmate did not  
25 carry a severe penalty.

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1                 Based upon all of my considerations of all the factors  
2 under 3553(a) relating to Count Two and the conduct that is  
3 before the Court in terms of conduct known to have occurred  
4 post sentencing, I find that a sentence of 120 months on Count  
5 One is appropriate and I am not touching that obviously. As I  
6 said I don't read the mandate as giving me a scope to do that  
7 but also 120 months on Count Two. That 120 months is comprised  
8 of the five year mandatory minimum but an additional five years  
9 based upon the Court's review of all the factors under 3553(a)  
10 as I have just described them including the conduct post  
11 sentencing.

12                 I also find as we discussed that the defendant should  
13 be given credit under 5G1.3 for the time spent in serving his  
14 state sentence that we discussed. So the way the Court will  
15 word that is from the date of arrest until the date of the  
16 imposition of the original sentence here, which is January 10,  
17 2010 to January 2013 with an instruction to the Bureau of  
18 Prisons not to give the defendant credit twice for time served  
19 but to certainly give the defendant full credit for time served  
20 for the state sentence during that period of time whatever that  
21 may be.

22                 I do believe that together this penalty serves the  
23 purposes of 3553(a) and it is sufficient but not greater than  
24 necessary to achieve the purposes 3553(a). I will maintain the  
25 five years of supervised release to run concurrently on each

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1 count that Judge Griesa imposed. Though, I would state that  
2 based upon 3553(a) factors certain conditions differently than  
3 were noted in the judgment that was imposed by Judge Griesa.  
4 This is based upon the Court's view as to additional conduct  
5 since original sentencing.

6 So there will be certain mandatory conditions: That  
7 the defendant shall not commit another federal, state or local  
8 crime; he shall not illegally possess a controlled substance;  
9 he shall submit to one random drug test within 15 days of his  
10 release of custody and two random drug tests thereafter; he  
11 shall not possess a firearm or other destructive device; and he  
12 shall cooperate in the collection of DNA as requested by  
13 Probation.

14 There will be standard conditions 1 through 13 and the  
15 follow special conditions: He shall provide the Probation  
16 Office with any requested financial information; he shall  
17 submit his person, vehicle, place of residence to reasonable to  
18 searches as requested by Probation; he shall obey all  
19 immigration laws and directives; he is to report to the nearest  
20 Probation Office within 72 hours from his release from custody;  
21 and he shall be supervised in his district of residence.

22 The special assessment has already been imposed. For  
23 both counts there was a 200-dollar special assessment  
24 previously imposed. So the Court does not reimpose it nor does  
25 the Court find it is appropriate to change Judge Griesa's

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1 determinations as to a fine, which there was none. Forfeiture,  
2 none. Restitution, none.

3 Do counsel have any legal or other reason why sentence  
4 should not be imposed as stated?

5 MR. FERRARA: I have no reason, your Honor. I would  
6 note, your Honor, the Bureau of Prisons asks us and apparently  
7 it is helpful if your Honor in the judgment actually cites to  
8 5G1.3. It is helpful to them for what they are doing.

9 THE COURT: So the Court will note that 5G1.3 is the  
10 reason for the calculation as indicated.

11 MR. DiCHIARA: Judge, I have a question. In the event  
12 that the Bureau of Prisons does not credit my client the way  
13 the Court decided he should be credited, do we come back for  
14 resentencing?

15 THE COURT: Well, there shouldn't be any resentencing,  
16 but my sentence will be as stated. If the Bureau of Prisons  
17 needs any clarification, it has in the past have asked the  
18 Court for its view as to the calculation. The view is really  
19 quite straightforward. 5G1.3 he gets credit for serving on the  
20 state crime. So whatever that is, it is three years or  
21 slightly less than three years.

22 MR. DiCHIARA: I just get concerned because of the  
23 fact that the guidelines -- I have had clients tell me that the  
24 Bureau of Prisons does what it wants and then you end up in a  
25 letter-writing campaign with the Court. The guidelines

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1 specifically talk about adjusting the sentence downward and  
2 perhaps the better decision here is to not finalize the  
3 judgment until the prosecutor and I speak to the Bureau of  
4 Prisons with the prosecutor's office.

5 THE COURT: I am happy to hold for a few days. I will  
6 not want to hold it more than a week --

7 MR. DiCHIARA: I understand.

8 THE COURT: -- to get it finalized so you folks get  
9 some clarity on how to word it so it is best geared towards  
10 achieving the goal, and I think we're all in agreement it  
11 should be achieved. The other way of proceeding would be to go  
12 with a habeas petition based upon a failure to give credit and  
13 release in the manner in which ordered by the Court, but that  
14 is big guns and it would better not to have to go down that  
15 route. That would be some time from now as well.

16 MR. DiCHIARA: I am trying to avoid that.

17 THE COURT: That would be many years from now.

18 MR. DiCHIARA: I have worked with Mr. Ferrara before.  
19 I would rely on whatever he says that the Bureau of Prisons  
20 says is the appropriate time. I have no reason to doubt that.  
21 If he says he needs a two-year adjustment or three-year  
22 adjustment, I would accept that.

23 THE COURT: I think that then the wording we had  
24 reached was the wording which is, He should get full credit for  
25 that time under 5G1 but if he has already received credit, he

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1 should not get that credit a second time.

2 MR. DiCHIARA: If Mr. Ferrara feels that is  
3 satisfactory for him to get credit and he is confident with  
4 that, then I will go with that.

5 MR. FERRARA: I am happy to double-check.

6 THE COURT: We'll hold this for a few days and we'll  
7 connect with you folks before we sign and post and docket the  
8 judgment to try to get some clarity on that language.

9 The Court does impose sentence as stated. I note that  
10 open counts have been dismissed. I think there were not any  
11 open counts, but there may have been an underlying indictment.  
12 It was dismissed in connection with the last sentencing.

13 MR. FERRARA: Correct.

14 THE COURT: Mr. Nunez Garcia, I want to instruct you  
15 as to your appeal rights. You have a right to appeal. Any  
16 notice of appeal has to be filed within 14 days of the filing  
17 of the judgment of conviction. If you can't afford the cost of  
18 an appeal, you can apply to have those costs waived. That is  
19 called proceeding in forma pauperis.

20 Anything other applications?

21 MR. FERRARA: Not from the government, your Honor.

22 MR. DiCHIARA: No, your Honor.

23 THE COURT: We're adjourned. Thank you.

24 ooo  
25